In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 624

CREAMER INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND ELLIS CAMPBELL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court's findings of fact and conclusions of law (R. 151–157) are not officially reported. The opinion of the court of appeals (Pet. 27–33) is reported at 349 F. 2d 625.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1965 (Pet. 36). The petition for a writ of certiorari was filed on September 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal tax lien attaches to real property erroneously omitted from a deed executed by a taxpayer when, as a matter of State law, the failure to record the conveyance of such property renders its transfer void as against creditors of the taxpayer.

STATUTES INVOLVED

Section 6323 of the Internal Revenue Code of 1954, 26 U.S.C. 6323, provides in pertinent part:

> SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.
>
> (a) Invalidity of Lien Without Notice.—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

19 Vernon's Texas Civil Statutes Annotated provides:

> Art. 6627. *When sales, etc., to be void unless registered*
>
> All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless they shall be acknowl-

edged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall be valid and binding.

STATEMENT

On January 21, 1959, petitioner and Maxwell Steel Company, Inc., ("Maxwell") entered into a contract whereby all of Maxwell's assets were to be conveyed to petitioner (Pet. 27–28). Both the contract and the deeds, executed on the same date, inadvertently omitted six lots of land, five of which are the subject of this lawsuit (Pet. 28).

On March 24, 1959, the United States made a jeopardy assessment against Maxwell. Notice of the tax lien which arose by virtue of the assessment was filed on March 26, 1959. On or about April 1, 1959, Maxwell executed and delivered a correcting deed, conveying the parcels in issue to petitioner (Pet. 28), and the deed was recorded on April 28, 1959.

In an action to quiet title, brought under 28 U.S.C. 2410, the district court held that petitioner's right was superior to the tax lien. The court of appeals reversed on the ground that under Texas law Maxwell's purported transfer of the property was void as against its creditors, and that the United States was in the position of a creditor (Pet. 27–33).

ARGUMENT

1. The court of appeals applied well-settled principles in looking to State law to determine whether

the property in question belonged to the taxpayer against whom the tax assessment had been made (*i.e.*, Maxwell) on the date on which the government's lien was filed. By virtue of a Texas statute, any conveyance of real property in that State which is unrerorded is "void as to all creditors" (p. 2, *supra*). The Texas courts have held that although a deed which inadvertently omits property which the parties intended to transfer may be corrected at the instance of the buyer, it conveys no greater rights against creditors or subsequent purchasers than an unrecorded instrument. *Henderson* v. *Odessa Building & Finance Co.*, 24 S.W. 2d 393 (Tex. Comm'n App.).[1] See also *United States* v. *Davidson*, 139 F. 2d 908 (C.A. 5). Hence it follows that, after its agreement with petitioner, Maxwell retained, under Texas law, enough of an interest in the omitted parcels of land to be able to transfer superior title to a bona fide purchaser or to have the property subjected to seizure by its creditors.

The Texas statute renders the conveyance void as to creditors holding liens by operation of law, and this category includes federal tax liens. *Parker Square*

[1] In *Henderson*, a judgment creditor asserted its lien against property which the debtor had intended, but neglected, to convey by a deed prior in time. The Texas court said (p. 394):

> The failure to convey the lot levied upon by plaintiff in error through mutual mistake of the parties gave defendant in error an equitable right to have the deed reformed by correction deed or a decree in equity, but, as plaintiffs in error had no knowledge of such equity at the time their levy was made, the lien thereby fixed was superior to the defendant in error's right to such reformation.

State Bank v. *Triangle Supply Co.*, 364 S.W. 2d 418 (Tex. Civ. App.); *Underwood* v. *United States*, 118 F. 2d 760 (C.A. 5); *Uhlhorn* v. *Owens*, 211 F. Supp. 798 (S.D. Tex.), affirmed *sub nom. Security State Bank* v. *Uhlhorn*, 325 F. 2d 92 (C.A. 5). The holding in the present case merely puts the government's tax lien on a par with any other lien created by operation of law, which must depend upon record title for its satisfaction. In order to carry out its recordation policy[2] the State has, in effect, refused to recognize as against third parties any unrecorded transfer of real property. The interest retained by the vendor under these circumstances qualifies under Section 6321 as "property" to which a tax lien may attach.

2. There is no merit to petitioner's claim that the tax lien is invalid under Section 6323(a). That provision (p. 2, *supra*) relates to interests obtained between the time at which a lien is imposed and the date on which a notice of lien is filed. In the present case, as the court of appeals observed, "[d]uring the two intervening days there was no happening or occurrence which could change [petitioner's] rights in the slightest. The rights of the parties were the same at the time the lien arose and at the time when notice was filed" (Pet. 31). Since, as we have shown, the transfer was void as against creditors under Texas law before the deed was corrected and recorded, it was void for the full period relevant under Section 6323(a).

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[2] See *Peninsula State Bank* v. *Thompson-Copeland, Inc.*, 346 F. 2d 58 (C.A. 5).

3. Nor, in the light of *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, is there any conflict which requires this Court's resolution between the decision here and that in *Gauvey* v. *United States*, 291 F. 2d 42 (C.A. 8). The issue believed by the Eighth Circuit to be dispositive in *Gauvey* was whether a conditional sales contract was a "mortgage" within the meaning of Section 6323; the court assumed that if it was a mortgage it was superior to a federal tax lien which arose subsequently but which was filed before the contract was recorded. 291 F. 2d at 47. This Court held in the *Pioneer American Insurance Co.* case that Section 6323 "did not purport * * * to subordinate the tax lien to tentative, conditional or imperfect state liens." 374 U.S. at 89. It seems quite clear, therefore, that the premise of the *Gauvey* decision—that unperfected liens or interests of the sort encompassed by Section 6323 are superior to later federal tax liens which are filed first—is erroneous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

JOSEPH KOVNER,
Attorney.

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